Nos. 425, 463 and 464

Oral Arguments for D.E. and Appellee.

Supreme Court of the United States

OCTOBER TERM, 1897.

JOSEPHINE C. DRAKE ET AL., *Plaintiffs in Error*, *vs.* DANIEL H. KOCHERSPERGER, County Treasurer, Etc.	No. 425.
ELIZABETH E. SAWYER ET AL., *Plaintiffs in Error*, *vs.* SAME.	No. 463.
JESSIE N. T. MAGOUN, *Appellant*, *vs.* ILLINOIS TRUST AND SAVINGS BANK, Executor, Etc., et al.	No. 464.

ORAL ARGUMENT OF ATTORNEY GENERAL EDWARD C. AKIN AND T. A. MORAN, ON BEHALF OF DEFENDANTS IN ERROR, IN SUPPORT OF THE CONSTITUTIONALITY OF THE INHERITANCE TAX LAW OF ILLINOIS.

WASHINGTON, D. C., JANUARY 28, 1898.

E. C. AKIN, *Attorney General*,
T. A. MORAN,
ROBERT S. ILES, AND
F. L. SHEPARD,
Of Counsel for Defendants in Error and Appellee.

PHILLIPS BROS., STATE PRINTERS.

IN THE

SUPREME COURT

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Josephine C. Drake, et al., *Plaintiffs in Error.*

vs.

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Elizabeth E. Sawyer, et al., *Plaintiffs in Error.*

vs.

Same.

No. 463.

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vs.

Illinois Trust and Savings Bank, Executor, Etc., et al.

No. 464.

ORAL ARGUMENT OF ATTORNEY GENERAL EDWARD C. AKIN FOR DEFENDANTS IN ERROR, JANUARY 28, 1898.

May it please the Court:

We have determined to divide not only the time, but the subjects for discussion. The principal subjects so learnedly discussed by counsel upon the other side will be discussed by my associate.

And in order that he may have a clear field, and ample time for their due consideration, I desire to call the Court's attention to not to exceed two questions of minor importance. There is a difference between counsel for the respective parties here as to the true interpretation of this law, at least in one respect. We are agreed that this law imposes a tax upon the privilege or right of succession to the property of a decedent, and not upon the property itself; that gifts, legacies and inheritances, or the property of decedents, are for the purposes of this act divided into six classes: Those passing to near relatives or lineals; those passing to collateral relations; those passing to strangers or distant relatives, and not exceeding $10,000 in value; those passing to strangers, exceeding $10,000 and not exceeding $20,000; those passing to strangers, exceeding $20,000 and not exceeding $50,000; and those passing to strangers which exceed $50,000.

We are agreed that with respect to the exercise of this privilege or right of succession to these classes of property, persons may be said to be divided by this law into three classes:

First, lineals, on whom the law imposes a tax of 1 per cent., based upon the amount passing to each person in excess of the exemption.

Second, collateral relations, who are taxed 2 per cent. upon the amount passing to each person in excess of the exemption.

Thirdly, all other persons

With respect to this latter class, the rate is progressive, a higher rate being charged upon a larger amount. And the basis of computation of the amount of the tax, as well as the determination of the rate, it is contended by our opponents, is based upon the aggregate

estate of the decedent; whereas, we contend that with respect to this class, as to each of the others, the rate of the tax and the amount of the tax are to be computed upon the amount passing to each distributee.

In support of our contention, I desire to call the Court's attention to two or three provisions of this act. It is entitled, "An act to tax gifts, legacies and inheritances."

Mr. Justice White: Pardon me; what are you reading from, sir?

Mr. Akin: Pardon me; I am reading from the appendix to the brief of plaintiffs in error, wherein the law is set forth.

The law is entitled: "An act to tax gifts, legacies and inheritances." Estates, by name at least, are not among the enumerated subjects of taxation.

The second section of the law, after exempting estates for life and terms of years, and imposing a tax upon the interest passing in remainder, contains this provision:

"*Provided*, that the person or persons, or body politic or corporate, beneficially interested in the property chargeable with said tax, elect not to pay the same until they shall come into the actual possession or enjoyment of such property; or, in that case, such person or persons, or body politic or corporate, shall give a bond to the people of the State of Illinois in the penalty of three times the amount of the tax arising upon such estate, with such surety as the county judge may approve, conditioned for the payment of said taxes and the interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of said property."

This provision applies equally to persons in each of the three several classes. And we submit that the language of the law clearly shows that the interest in remainder, which is to be the basis of computation, is the interest which passes to each beneficiary. Certainly the law does not intend to say to a person who should be left an interest in remainder in a certain piece of real estate which formed a part of a decedent's estate, that if he did not desire that the tax upon that interest should be paid at once, and desired to give a bond for its future payment, he should be required to give a bond not only for the payment of the tax upon the interest in which he is beneficially interested, but a bond to secure the entire tax upon the entire class of estates and interests passing to other persons within his class.

Again, in the fourth section of this law, it is provided that:

"Any administrator, executor or trustee, having in charge or trust any legacies or property for distribution, subject to the said tax, shall deduct the tax therefrom; or if the legacy or property be not money, he shall collect a tax thereon upon the appraised value thereof from the legatee or person entitled to such property; and he shall not deliver or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon. And whenever any such legacy shall be charged upon or payable out of real estate, the heir, or devisee, before paying the same, shall deduct said tax therefrom, and pay the same to the executor, administrator or trustee; and the same shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor, administrator or trustee, in the same manner that the payment of said legacies might be enforced."

We submit that this language clearly shows and evinces the intention of the Legislature to make the tax a charge upon the particular devisee or distributee, and the property passing to such individual devisee or distributee subject to a lien for the tax.

And, again in section 11, after providing for appraising the property of a decedent, and the return of the appraisers' report to the court, it provides:

"And from this report the said county judge shall forthwith use and fix the then cash value of all estates, annuities, and life estates or terms of years, growing out of said estate, and the tax to which the same is liable."

Here again we think the intent of the Legislature is clearly shown to require of the county judge that he determine the value of each estate passing to each legatee or beneficiary, and that he determine the amount of tax upon that particular interest. And we submit that, taking all these provisions together, it is clearly shown that the purpose of the Legislature was that the amount of the tax and the rate of the tax with respect to the third class of persons was to be computed upon the value of the estate or property passing to each person, the same as in the first and second classes.

The construction for which we contend is the one which has been adopted by the courts of the State wherein this law was enacted, whenever those courts have been called upon to administer this law. This is clearly shown in the record of the case of Elizabeth Emerson Sawyer and others against Kochersperger, one of the cases pending before this Court.

In that case an appraisement of the property was made, and the county judge fixed the value arising out of the estate of Mr. Sawyer, and the amount of tax for which each separate share or portion was liable. That is clearly set forth on page 5; and by reference to this record, the Court will see that Mr. Sawyer left five separate legacies, to five different persons, in the third class, and in different amounts, and that the county judge, in determining the value of the estates, and in determining the rate of the tax, treated each legacy separately.

Upon the legacy to Mary Louisa Turner of $25,000 a tax of 5 per cent. is levied, it being in excess of $20,000, and not exceeding $50,000.

Upon the legacy to Henrietta W. Turner, the tax is levied at 4 per cent., it being in excess of $10,000, and not exceeding $20,000.

Upon the legacy of Addie A. Sawyer, of $1,000, the tax is levied at the rate of 3 per cent., that being a legacy less than $10,000. And the same is true of the legacy of $5,000 to Mary Elizabeth Haley, and that of $2,500 to Sarah Fairfield Johnson.

Here, in this case, the County Court of Cook county adopted and applied our construction of law; and when this case was removed to the United States Circuit Court, the judge of the Court, in confirming the action of the lower Court, adopted the same construction. And in this case we submit that even counsel for plaintiffs in error have admitted that the action of County Court was correct, and that our construction of the law is a true one. In their answer to the petition filed in that case, they say—I read from page 33 of the Record in the Sawyer case:

"And these defendants, further answering, admit that the legacy, devise or bequest to Mary Louise Turner amounts to $25,000, and that the alleged tax thereon, under and by virtue of the provisions of said act hereinbefore referred to, amounts to 5 per cent."

And they go on and make the same admission with respect to each of the legacies to the other persons within this same class.

But it is contended that the Supreme Court of the State of Illinois has placed a different construction upon this law. And counsel, in support of their contention, on page 8 of their original brief, cite this portion of the opinion of the Supreme Court in the Drake case:

"By this act of the Legislature, six classes of property are created, heretofore absolutely unknown. It is those classes of property, depending upon the estate owned by one dying possessed thereof, which the State may regulate as to its descent, and the right to devise. * * * No person inherits property or can take by devise except by statute; and the State, having power to regulate this question, may create classes and provide for uniformity with reference to classes which were before unknown."

We are unable to see how that language supports the contention of our opponents, that, with respect to the third class of persons, the amount of the tax and the rate of tax are to be determined by the estate of the decedent. But the Court will note that in the center of the quotation there appear three stars, indicating that some portion of the opinion of the Court has been omitted. Naturally we would suppose that that portion of the opinion does not refer to this question. But the Court will observe, upon reference to the opinion, that the omitted portion determines the very question that is here being discussed.

The opinion of the Supreme Court is found in the record in the case of Joseph Drake and others, No. 425, beginning on page 8. The portion of the opinion which is omitted in the brief of plaintiffs in error reads as follows:

"The tax on classes thus created is absolutely uniform on the classes upon which it operates, and, under the provisions of the statute, is to be determined by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property inherited."

Now, we submit that the Supreme Court of the State of Illinois has construed this law to mean that the amount of the tax and the rate of the tax are to be computed, not upon the aggregate estate of the decedent, but upon the property passing to each person, so that each person shall pay a tax in proportion to the property by him, her or it inherited.

Taking these decisions together with the provisions of the law which we have cited, we submit to the Court that under this third classification of persons the rate of tax and the amount of the tax are to be computed upon the estate passing to each person, and not upon the aggregate of the estate of the decedent.

To illustrate the absurdity of appellant's contention, let me cite this case: Suppose an estate of $1,000,000 is divided as follows: $750,000 to immediate relatives, $200,000 to collateral relatives, and $50,000 to strangers in the third class. If the tax on these legacies to strangers is to be computed upon the aggregate of decedent's estate, the tax would be 6 per cent. upon $1,000,000, or $60,000. That would entirely obliterate the legacies, and would leave a tax of

$10,000 in excess thereof, for the collection and payment of which there would be absolutely no provision in the law.

But counsel, in their reply brief, take somewhat different grounds, and they say there that what they mean to be understood as saying is, not that the tax is upon the aggregate of decedent's estate, but upon the aggregate of those portions of the estate which pass to persons of this class. They have cited illustrations here to show that one ground upon which they assail this law is that two persons may receive legacies of the same amount and be charged different prices therefor. If their contention is true then all legacies going to persons in this class of every given estate pays, not a different rate per cent., but a uniform rate. If the rate is based upon the aggregate of the portions passing to this class, then the same rate that is levied upon the aggregate of those portions is necessarily levied upon each part of such aggregate amount.

Take, for instance, the Sawyer case. The five legacies left to strangers or persons of the third class amount to $53,500. According to their contention the tax to be levied on account of those legacies, the total amount being in excess of $50,000, would be 6 per cent. The amount of the tax would be $3,210, or 6 per cent. upon each one of those legacies. So that persons, instead of paying a tax according to the value of the legacy received, would in each and every case pay a uniform rate; and the person in this class who received a legacy of $1,000 would pay 6 per cent., the same as the person who received $25,000. Thus the very purpose of the Legislature, which they insist is evinced in this law, would be defeated and the objection which they so strenuously urge obviated.

There is but one other question to which I desire to call the attention of the Court, and that is that even if a portion of this law is unconstitutional, the whole need not and should not be held to be so. The general rule is stated by this Court in the case of Supervisors v. Stanley (105 U. S. 305), where the Court say:

"The general proposition must be conceded that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded."

We submit that this law treats of separate classes of property and separate classes of persons. It is enforceable with respect to each class, regardless of either or both of the others.

If the entire contention of plaintiffs in error should be sustained by this Court, then we concede that the intent of the Legislature would to such a great extent be defeated that the whole law should fall. But if the exemptions are sustained, then we submit that even if this progressive, graduated tax feature applying only to the third class is held by the Court to be unconstitutional, the balance of the law must stand, because that is entirely separable from the remainder, and because the portion of estates which passes to strangers—and they can only take by virtue of some testamentary provision and not under intestate laws—that that portion is so infinitesimally small, as compared with the whole, that it can be said to be invalid without in any material degree affecting the intention of the Legislature or the amount of revenue to be derived from the law.

I thank the Court for its attention.

ORAL ARGUMENT OF MR. T. A. MORAN, FOR DEFENDANTS IN ERROR.

May it please the Court:

The attack on the Illinois Inheritance Law proceeds upon two fundamental misconceptions; one, that the sum or bonus exacted by the State from the inheritance is a tax upon property; and the other, that the right of inheritance is a property right secured by the Constitution, and vested in children or other kin of a decedent.

If the last of these propositions is untrue, as I think we shall be able to establish, the first must go down. It will be my task to show in the time alloted to me that both of these propositions are unsound. This should be unnecessary, as perhaps never before in any court of judicature has the position been attempted to be maintained that there is a natural right of inheritance which as a property right could not be taken away by the Legislature.

There has been an evolution in the argument of my learned friends on the other side of this case. In their original brief they insinuated, rather than asserted, that inheritance was a natural and vested property right. There was no attempt made in that brief to sustain that proposition by reference to authority.

Our brief—I think we may take the credit of it—aroused opposing counsel to an appreciation of the difficulties of their position. Hence, in their reply brief they have devoted themselves to a historical discussion of early recognition by different nations of the right to inherit property, or the right to make wills, which they assert establishes inheritance as a natural right. If this assertion were not made by counsel who are learned and distinguished in their

profession, I would not presume to take the time of this Tribunal with a discussion of the question whether inheritance or the right to make a will is a natural right.

Counsel in the reply brief, in which they cite a number of writers on the history of the law, who allude sometimes in their language to the rights of inheritance as a natural right, just as Mr. Justice Brown, in the opinion quoted from in United States v. Perkins, alluded, in passing, to the right of inheritance, as a natural right recognized by the legislation of nations.

The right of a man to hold property and to control it without the aid of absolute law ceases at his death. Whatever interest he has in property is snuffed out, like the light of a candle, when his life passes away. He has, except under positive laws, no control of it whatever after his death. That he has the natural right to project his control of it into the future by a testament is so absurd a statement that when made every mind consciously rejects it.

Mr. Justice White: Your argument, then, goes to the length that a law may be passed saying that all property shall go to the State upon the death of anybody?

Mr. Moran: Necessarily, your Honor. There is no escape from that logical conclusion. When the distinction between rights which come to us by nature and those which are created and bestowed upon us by positive enactments is considered, such conclusion is compelled.

It is not necessary, as counsel admit, for us to establish in this case any such right in the State, for, as they say in their brief, all

that was attempted by this legislation of Illinois was mere regulation. I address myself to this proposition for the purpose only of showing that laws which permit inheritance are laws which grant privileges; that laws which permit a testator to make a will are laws which grant to him a right which he did not get by nature, and which is not inalienable.

While the learned counsel have exhibited great industry and most unusual research, they have failed to cite a single author—and they have gone back to the twilight of history itself—that has distinctly asserted that this right is a natural right. From certain propositions found in writings, they have, with considerable ingenuity, extracted certain sentences. Let me illustrate: One citation in this reply brief, under the head that "The Right of Inheritance and Testamentary Dispositions are not of Statutory Origin, and that they are Natural Rights," is this:

"It will hardly be contended that the right of property originated in statute law. * * * Property and law are born and must die together. Before the laws there was no property. Take away the laws and all property ceases."

That extract is taken from page 327 of Cooley's Principles of Constitutional Law, section 2, which discusses the protection of property under the law. Turning over a few pages, the author, continuing the discussion of the same subject matter, points out a distinction which my learned friends have, either consciously or unconsciously, ignored in this case:

He shows that the test of unlawful interference with property is that vested rights are abridged or taken away. Rights are vested in

contra-distinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person as a present interest. They are expectant when they depend upon the continued existence of a present condition of things until the happening of some future event.

Then he goes on to say:

"The rules of descent may be changed in the legislative discretion, though thereby the expectations of living persons under the previous laws are disappointed. The living have no heirs, and the laws which provide who shall be their heirs in the event of their death are only expressive of the present views of what is best, and may be changed as these views change, and no vested rights can be impaired, since no rights under these laws can vest while the owner of the estate is living."

That passage alone would be sufficient, if it is to be taken as authoritative, to answer the entire contention of the distinguished counsel who preceded me. Maine on Ancient Law, page 175, shows that right to make a will is not a natural right.

The proposition is one upon which all authorities agree. The doctrine is nowhere more intelligently stated than by the Supreme Court of Illinois. In the case of Sturgis v. Ewing, in 18 Ill., Mr. Justice Caton, one of the ablest judges who ever sat upon the bench in our State, discussed this question, and I will read what he says as it appears on page 26 of our brief:

"Can there be a doubt that the right to devise is a subject entirely within the control of the Legislature? The power to devise is not

an inherited natural right, conferred upon us by the law of nature, as is the right to acquire and own."

There is the distinction that my learned friend missed.

"So long as we can not possess, control, or enjoy anything we have, after we are dead, we can have no absolute right to say what shall be done with our acquisitions after that period. As mortals we then cease to be, and all connection with earth and our acquisitions terminate. * * * Depending alone upon the law of nature our estates would become the property of the first who should seize them as they fell from our hands. The power to control the disposition of our possessions after our demise is conferred by municipal laws, and is purely a subject of municipal regulation. It is not a part of the right of property itself, but it is only an incident to it, as the law for the time being makes it so. Without this power our title may be complete and absolute. By devising our property we do not lessen or impair in the least degree our title to the property devised. We may change the devise, or alienate it at pleasure at any time during our lives, and until our demise the devisee acquires no sort of right or title to it. When we acquire property we do not acquire with it, as part of it, the right to devise it in any particular mode, or even to devise it at all. The objections urged to this law involves the proposition that whoever acquires property acquires with it the right to divest it according to the law as it then exists."

The learned Judge then goes on to discuss the other phase, that is, the right of inheritance, saying that both of these rights are the creatures of the Legislature, and only exist because the Legislature creates them by positive law.

In another case in our Supreme Court, reported in 3 Scammon, it was said:

"The Legislature may so change the law of descents as to cut off all our expectations of inheritance, and confer it upon a single child, and may deny the power of disposition by will so as to prevent the bounty of our parents."

Language substantially equivalent to that has been used by every court in this country that has been called upon to discuss this question, and has been used by this Court, so that our learned friends do not enjoy the privilege of discussing here a question that is open in this tribunal.

Mr. Justice Harlan: What you have read from Judge Caton does not conflict with the idea that a man may in his lifetime make a disposition of his property that will take effect upon his death.

Mr. Moran: Perhaps it may, your Honor. I was about to come to that. I will content myself now with the proposition that every Court has been called upon to consider this question, and every author that has written upon it has declared that it is the creature of municipal law; that it exists only by the will of the Legislature; and that it can have no other existence; that the grant of the right to make a will, or the right to devise is the creation of a privilege that does not exist before the act granting it is passed. How can it be otherwise? Our own Supreme Court in this very case says we have by our statutes repealed the Common Law and the Statute of Descent of England, enacted prior to the fourth year of James the 1st. That being the condition of things, how are you going to inherit?

What law is it that fixes the terms of the conditions of title to property of a decedent unless you find it in a statute?

The Common Law repealed, the English Statute of Descents repealed, if no statute of Illinois devolved the estate to persons described therein, or authorized the owner thereof to direct its devolution by testament, is not the conclusion forced that property on the death of an owner would return to the State, from which it is in theory originally derived? It is not thinkable, not conceivable, that property of any kind can descend, or be transmitted by testament in the absence of positive law, creating the privilege of receiving it on the one hand or of transmitting it on the other.

Why, if your Honors please, it is an abuse of the time of this tribunal to undertake to argue here that the right of inheritance is a natural right or a property right protected by constitutions, and not absolutely and entirely and without limit at the disposal of the Legislature. There is no basis for such an argument, no foundation for it, either in history or in law. Such a proposition is as baseless as the fabric of a vision, as completely without substantial foundation as a castle in the air.

Well, if your Honors please, this proposition does not interfere with the right of a party to dispose of his property during life. The right to dispose of property is an incident of property. It is connected with it; it is controlled by law; it is a vested right, and it can not be interfered with without violating the provisions of the Constitution. The Legislature can not confiscate my property or any portion of my property. It is protected by the Constitution as a vested right. The Legislature could not prevent the making of a

gift *inter vivos*, because such a gift is a contract and it is a necessary incident of property that one may dispose of it or acquire it by contract, and such a right is not only a liberty, but is a property right, which is vested, and is therefore within the protection of the Constitution. Such a disposal of property is not testamentary in character, and is to be distinguished from a gift *causa mortis*, or other attempted disposal or conveyance made in contemplation of death, and which is to take effect in possession only after death. This latter class of transfers is affected by the Illinois statute, and such conveyances have always been treated as essentially different in character from transfers *inter vivos*, and if interests passing by such deeds or gifts could not be subjected to bonus conditions, it is very apparent that an inheritance tax law, however unobjectionable in other respects, could not be made effective, for it would easily be evaded by gifts *causa mortis*, or by grants to take effect in enjoyment upon the death of the grantor.

When the Legislature attempts to deal with my property rights, it is bound to respect them as vested, but when the Legislature comes to extend to me a privilege, it can extend it to me under such conditions as it sees fit; and when it imposes a condition that there shall be paid, or be taken, a portion of the bequest or devise to me for the benefit of the State, it is not exercising the power of taxation upon property.

So that the question insinuated by the learned gentleman who preceded me, that the Legislature could not reduce a man's property to a life estate, has no pertinence to the argument. Suppose a man has a piece of real estate; he has a right to sell that during his life, has he not? It is a fee. It passes as a fee forever. He may dis-

pose of it by sale or by gift *inter vivos*. This statute in no manner affects the quantity of the estate that one takes or one grants. Counsel thought he was putting a perplexing question when he asked if legislatures might repeal laws with reference to transferring property; that is, laws declaring how the passing of title should be evidenced. Well, if your Honors please, what necessity is there for a deed? Suppose one of your Honors wishes to invest me with your estate. Put me in possession of it, and I need no deed. You want to invest me with your personal property. By gift *inter vivos* put me in possession of it, I have a good title against the whole world. Transfer of property *inter vivos* needs not the aid of statutory law. The statutes with reference to the transfer of real estate and personal property are purely matters of convenience; wise and just and good, but purely matters of convenience; and subject, as counsel say, to change and regulation by the Legislature. When the Legislature should undertake to say that I should not pass my property by gift *inter vivos*—that I should not acquire property by contract during life—then would the limitations of the Constitution come in and restrain the law.

Mr. Justice Harlan: Could the Legislature prescribe that all gifts of personal property should be in writing and recorded?

Mr. Moran: Yes, they could, as between certain persons. They have done it in our state as between certain persons. But that would be a mere regulation, and only for the benefit of creditors.

Mr. Justice Harlan: Could the Legislature say that no title to property shall pass to anyone except by a written instrument put on record?

Mr. Moran: Possibly. Possibly the Legislature might have control of the question of making evidence of title. What I say is that it is mere regulation. The Legislature might prescribe that title should pass in a certain way, but the Legislature could not prescribe that the property should be taken or that it should not be subject to incidents of sale and delivery in some way.

I will assume that the first contention on which the attack on this law depends is sufficiently answered. Cases sustaining our position are abundantly cited in our brief. No case can be found that holds the contrary. Hence, when the learned and distinguished counsel who is to follow me asked for an extension of time beyond that which the rules of this Court allow for oral discussion, in sympathy for him, knowing what he had undertaken to maintain, I was perfectly willing that he should have the time, for I was perfectly conscious that he needed it.

Now, if your Honors please, I come to the next proposition. If this is a privilege granted; if, as numbers of these cases have said, and as Mr. Justice Brown wrote in U. S. v. Perkins, the State could take all, could deny the bequest entirely, it may impose such conditions on the grant of this privilege as it may in its discretion deem proper.

In the cases that have been decided—for this question is comparatively a new one—much has been said inadvertently by the Courts For instance, this right of the State to take a bonus or price for the privilege of inheritance has been denominated a tax. Well, we are in the habit of using the shortest word, and in one sense whatever is exacted for public use may be a tax. But the word "tax" used in the

decisions, in nearly all cases, as appears from the opinions themselves, is distinguished by learned judges who use it. It is said in many of the cases, that this imposition on inheritance is not a tax in the sense in which we speak of a tax upon property, and hence it is not an exercise of the taxing power. But the very courts that make that distinction fall into another mistake. They say it is like an excise; that it is like a tax imposed upon occupation; and that it is to be compared to that power which in levying such tax is exercised by the State. A moment's reflection will show that such comparison is incorrect. An occupation is *not created* by the State. Take a shoemaker: He learns his trade; he qualifies himself by a period of apprenticeship to exercise that calling; he does not get that right from the State; he selects his occupation and is free to do so, and such calling is not created by the State. But the State comes and says: You may exercise that calling by paying a certain tax, a certain excise; you may be licensed to work at that trade upon the payment of a certain sum. Does the State in doing this create the occupation, or does it restrain the exercise of the occupation that is already existing? It is manifestly a different thing to apply an occupation tax or a capitation tax, from applying or requiring the payment of a bonus or price upon the grant of a privilege. Then such instances, though they have been used in opinions to illustrate the exercise of this power by the Legislature, are not apt, because in the very nature of things an occupation is different from a privilege. When a State imposes a license tax upon an occupation it does not grant a privilege; it restrains the exercise of the occupation, which could be enjoyed without the aid of the law; it is the difference between preventing and creating; the difference between imposing a burden upon that which already exists, and creat-

ing originally and offering to one a privilege accompanied by conditions which if he may take it he must comply with.

Conferring on a citizen the privilege of inheritance is more like the grant of a franchise to a corporation than anything else. The cases, in my opinion, that discuss the right of the State to impose upon a corporation a bonus upon the taking of corporate rights are illustrative of the rule that must apply in such cases as the one now before the Court.

The right to be a corporation is, as has been said by this Court, a valuable right. Mr. Justice Field says, in Home Ins. Co. v. New York, that the right to be a corporation is a right of great value. It can only be granted by the State. Such privilege is the act of a creative statute. Congress has a right to incorporate a company when the object of the company is to accomplish something within federal dominion. There is in the Constitution no grant of express power to Congress to create corporations. It is merely an incidental power of government. It may be exercised by special laws incorporating particular corporations, as was done in chartering the different Pacific railroads, or by general laws, as in the case of national bank charters.

The states, generally, now have constitutional provisions requiring corporations to be organized under general laws. In Illinois the Legislature is prohibited from granting special charters now; but as Mr. Chief Justice Fuller will very well recollect, up to the adoption of the Constitution of 1870 special charters might be granted in Illinois. Now suppose the State is applied to where there is no constitutional inhibition against special charters by certain corporators

for the privilege of organizing a corporate body, the privilege of being a corporation, the State may pass an act authorizing the persons named and their associates to be a body corporate, with power to sue and be sued, etc., to engage in the grocery business, or to engage in the manufacture of iron, and the State may say to these corporators: You may take this power to be a corporation, with a capital of $10,000, and for that you shall pay into the State treasury, $500. That is a special charter, a special privilege, granted by the State upon a special condition imposed by the State, and if the corporators do not want the charter they need not take it. As the Court of Appeals of New York said, if they take the boon they must accept the burden. Another set of corporators may come the next day and ask the Legislature for a special charter, for identically the same powers, with identically the same capital, to do identically the same thing. Is the Legislature bound to let them have a charter at the same price? Does the Legislature deny the equal protection of the laws by imposing upon the second set different conditions and a different bonus? Can the one set say, You granted the privilege to those other people for $500; why impose $1,000 upon us? The Legislature might grant the special charter to one set of people for nothing, to another set of people for a certain sum, and to still a third set for an entirely different sum. There need be no proportion between the sums, no ratability between the bonus required from one and that imposed on the other. If that is so, may not the Legislature accomplish the same results by a general law, making a classification of corporations? May it not impose upon corporations organizing with a capital of $10,000 one sum, and upon organizations organizing with a capital of $100,000 another? And may it take amount of capitalization as the point which shall distinguish between the two classes?

Capital is not value; amount of capital is no indication of what the right to be a corporation is worth. It is not the question of value, but amount of capital is the line or mark that the Legislature arbitrarily sees fit to select on which the classification is made for the purpose of exacting the bonus.

This Court has had these questions before it; has determined them. In 127 U. S., California v. The Central Pacific Railway Co., Mr. Justice Bradley, in delivering the opinion of the Court, speaking of the right to impose what was there said to be a tax upon the franchise of the corporation, said:

"It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be $10,000 or $1,000,000, as the Legislature may choose, or without valuation of franchise at all, and tax may be arbitrarily laid."

That is the rule that governs the granting of a franchise. The grant of a franchise is a privilege. I have defined a privilege thus:

"A privilege is a right or franchise created by a legislative grant, conferring some power or right or duty upon a citizen, and which no citizen or individual can exercise or avail of without the authority of the statute—a law which confers upon some one or more individuals the right or authority to take, do, or enjoy some particular thing which, without the authority of the statute they could not take, do, or enjoy."

The learned counsel in their reply brief, after following a course of reasoning that is not quite intelligible to me, and after two chapters in which they undertake to demonstrate that inheritance is a natural right, and that the right of testamentary disposal is a

natural right, acknowledge that one of these natural rights may be superior to the other; and they say, as a conclusion of this discussion:

"The Legislature may exclude altogether the right of inheritance; but this it may only do by the fullest recognition of the testamentary right. It can not exclude the natural right of inheritance by according rights of inheritance to persons who have no natural right to inherit; nor can it deny the right of inheritance when the testamentary right has not been exercised."

What do you do with illegitimates? There has never been a nation in the world where the illegitimate has been regarded as having any *natural right* at all. By the common law he is *nullius filius*. He has neither father, nor mother, brother nor sister. Can not the State give to this person who has, according to the law of all civilized nations, no natural right whatever, the right of inheritance as against children born in lawful wedlock? Can it not do it by special legislation, if your Honors please? We know that many of the states have systems of legitimation. In Louisiana, I believe, there is some proceedings before a notary, the particular details of which I do not know. In other states statutes have been passed recognizing the rights of illegitimates, or rather, giving rights to illegitimates. Such statutes have been passed in Arkansas, Georgia, North Carolina, Virginia and in Maryland. Mr. Justice Woodward said that in Pennsylvania the illegitimate may be made capable of inheriting, as Blackstone says, by the transcendent power of an act of Parliament, and not otherwise, as was done in the case of John of Gaunt's illegitimate children by Statute Richard II. "We have," says the learned Judge, "on our statute book acts of legitimation without

number." By that he means acts of special legitimation of particular illegitimates by name. In Georgia several persons, four or five, were legitimated by one act by name, giving them inheritable blood.

Judge Woodward said in the case alluded to:

"Because our Constitution is silent on the subject, the legislative power is plenary. I am not aware that it has ever been questioned. An estate that has already descended to the legal heir can not be divested; but that the taint of blood may be cured for purposes of future inheritance, by the healing touch of the Legislature, is not to be doubted."

Killam v. Killam, 39 Penn. St., p. 123.

In McGunnigle v. McKee, 77 Penn St., Judge Mercer said:

"The legislative power may remove the legal taint of blood, either by general or special law. For this purpose the power is most ample. The most striking case of legislative power to legitimate bastard children is shown in the case of Brewer v. Blougher, 14 Pet., 178. The Supreme Court of the United States there held a general law of the State of Maryland declaring illegitimate children capable of inheriting from their mother to extend to those begotten in incestuous connection."

In Brewer v. Blougher, Mr. Justice Taney said:

"The expediency and moral tendency of this new law of inheritance is a question for the Legislature of Maryland and not for this Court."

In Steven's Heirs v. Sullivant, 5 Wheat., 207, in the opinion of this Court, a law of Virginia was interpreted as making the illegiti-

mate children of a mother *quasi*-legitimate, but leaving them in other respects without father, brothers or sisters. In a learned note to the case, it is stated that the Emperor Valentinian permitted the illegitimate children of fathers who had also legitimate offspring to acquire by will one-twelfth part of the paternal property, and in case the father had no legitimate children or surviving parents he might dispose in the same manner of one-fourth of his estate in favor of his illegitimate children. And by the Code Napoleon, illegitimate children, legally recognized as such, are entitled, in case their father shall have left legitimate descendants, to one-third of the portion to which they would have been entitled had they been legitimate. And in case the former shall have left no descendants, but only kindred in the ascending line, or brothers or sisters, to a moiety of the same, and in case the parents shall have left neither descendants nor kindred in the ascending line, nor brothers or sisters, to three-fourths of the same portion.

It is very clear, therefore, that it has always been the law that legitimates might be fully or in part rendered worthy of inheritance. The Legislature may invest an illegitimate with the privilege of inheriting an estate of his deceased natural parent to the extent of $10,000 or $20,000, and upon the granting of this privilege it may impose the condition that he shall pay out of the estate which he is thus empowered to take, any sum which the Legislature may in its discretion see fit to exact, and an act empowering one illegitimate by name to inherit one sum in no manner restrains the Legislature from passing an act authorizing another illegitimate to inherit a different sum, or the same sum, and to require from the privilege granted to this second illegitimate a different sum to be paid into the treasury

of the State. If the Legislature can do this by single special acts, it may do the same thing with reference to two or three specific individuals in the same act, and may impose upon the privileges granted to these individuals respectively conditions and exact from them different sums, larger or smaller, as the Legislature may determine, as the condition of their availing of the privilege extended to them. If this can be done what principle of constitutional law inhibits the Legislature, from, by a general act, granting to illegitimates privileges of inheritance or privileges of taking by bequest and imposing as conditions of the exercise of the privilege different bonuses or exactions upon such class according to the sum or amount which each one inherits or receives. And what rule is there that requires the Legislature to make the rate proportionate to each one or prevents the Legislature from in the same act providing that illegitimates may take an inheritance of one amount, without paying any duty or bequest thereon whatever, and providing that illegitimates who take other and different amounts shall pay for the privilege such specific sums as the Legislature determines shall be paid, or prevents these sums from being arbitrary or disproportional and imposed without regard to any rate whatever as to the value of the actual inheritances taken by the class?

Unless learned counsel can bring to the attention of this Court some constitutional principle that will control such legislation, they must fail in their contention in the case at bar. There is no such principle, for the reason that the granting of privileges upon bonuses or imposts, or the exactions of sums by the State is wholly different in its nature from the levying of taxes upon property, and it is not

and can not be in any manner subject to the same restraints and controls that are provided by the Constitution to guide the levy of such a tax.

When you speak of lineals you mean descendants born in lawful wedlock. Here is a stranger taken by the State, a stranger in law, a person without any ancestor; and by the fiat of the Legislature he is made co-heir with the child born in lawful wedlock. If there is but one child born in lawful wedlock, this illegitimate child, this child of the bondwoman, is by the fiat of the Legislature made co-heir with the child of the free woman.

Chancellor Kent says that it is the law of universal civilized society that when an estate is without lawful heirs entitled to it, it escheats to the State. The doctrine that it is in the power of the State to create conditions which will leave none but itself to take the property of a decedent is too old to have applied to it the opprobrious epithet of socialism. The exercise of this power would be the exercise of a power that this Court has said resides in every sovereignty.

My learned friend has referred to the Ordinance of 1787. We referred to it in our brief to show what the policy of the law was in this country. He cites it for a different purpose. He says that it declared a rule of inheritance, a rule of testation. So it did. By that ordinance the nation provided by legislation the rule of inheritance and testation in the territory of the Northwest. But it did more. It recognized this right in the State of Illinois that I am here contending for. It declared that

"This law relative to descents and dower shall remain in full force until altered by the Legislature of the district, and until the Governor and Judges shall adopt laws as hereinafter mentioned, estates in said territory may be devised or bequeathed by wills in writing signed and sealed by him or her," etc.

This national legislation recognized the right of State legislation to change in the Northwest Territory the law of descent and of wills. When Illinois came into the Union she reserved to herself and to her people the right to legislate with reference to the descent of property, and the disposition of property by will in that State. That right she did not give up when she consented to the adoption of the Fourteenth Amendment.

The Fourteenth Amendment, as this Court has shown, relates to taxation of property. The exacting of an amount as a bonus or price for a privilege, as this Court has determined, is not the power of taxing property. Speaking about this power to impose these exactions the Supreme Court of Maine distinguishes aptly:

"An excise tax upon the value of property so allowed to be received by the collateral of the strangers to the blood leaves him in much better condition than an absolute withdrawal of the privilege would. He can not complain of unjust taxation when the State allows him to take property subject to a duty of 2½ per cent. when the State has the right to exclude him from the whole."

And further, the Court said:

"There is no given sum to be assessed in which the privilege is fixed by valuation, but the percentage is fixed by law, leaving the

amount to be ascertained by valuation. The value of the property is resorted to to measure the amount of the excise."

And the Supreme Court of Massachusets says in Minot v. Winthrop:

"Taxes on legacies and inheritances or on successions in any form to property on the death of the owner have generally been considered not as taxes upon property, but as excises upon the privileges of taking or transmitting property in this way."

And as to exemptions, it says:

"With reference to the exemption, it is within the peculiar jurisdiction or discretion of the Legislature to determine what exemption should be made in apportioning the burdens of taxation among those who can best bear shem."

And that brings me to the discussion of this question of exemption, because, notwithstanding all the argument of my learned friend, he comes in the end to the admission that the State may regulate the right of inheritance and of making a will; and he admits that the Legislature may make an exemption. But he says it must be a reasonable exemption. Well, if your Honors please, who is going to determine whether it is a reasonable exemption or not? What rule has been fixed or announced? Where is the rule found which determines what is a reasonable exemption when the Legislature has the acknowledged right to exempt? Counsel have persistently avoided stating in their brief any rule which will govern either this Tribunal or the Legislature. Granted the right to exempt, who shall determine its reasonableness? When you talk about exempting privileges from taxation, what rule of the Constitution can you

specify that will guide the mind of any man or set of men in fixing the amount that shall be exempted and allowed to be taken without the imposition of a bonus? My learned friend must state the rule to this Court. That rule which will control the Legislature in the exercise of that discretion must be made to appear as definite to the judicial eye as material substance is to the touch. The rule must be ascertained, stated, defined. It can not be left ambiguous, uncertain. The idea can not be left to float "undefined upon a gorgeous haze of words."

If your Honors please, the Legislature of Illinois admittedly have the right to exempt. Then they have and without control the right to determine what is reasonable exemption. Who shall say for the sovereignty of Illinois what shall be a reasonable exemption of estates passing from decedents within the borders of that State? What power or authority shall do it? I have perfect confidence in the wisdom and judgment of this august tribunal, but still I prefer, upon the question of what is a reasonable exemption, the determination of the Legislature of Illinois. Why? Because the institutions of my country forbid me to ask from this Court the exercise of a discretion, or the review of a discretion, and deny to the Court the authority to limit a discretion that the constitution has reposed without control in the Legislature of Illinois.

It is said that $20,000 is too much. How does counsel know that $20,000 is too much to be exempted in Illinois to lineals? But he says you must not exempt an estate so that a poor man might enjoy the privilege untaxed. To do that would be spoliation, socialism. The Legislature of Illinois is the only body that is authorized by law to determine what exemptions are most wise and just for the inter-

ests of the inhabitants of our State. That body knows the condition of our people.

If your Honors enter upon the discussion of what is a reasonable exemption of a legacy in our community, you want other and more information than you now have.

You are invited here to exercise a power that you have constantly repudiated. Authorities are cited here with reference to exemptions of *property* from taxation. When you come to tax property, you are taxing that which is a vested right in the owner. The laws of uniformity and equality apply. Authorities that relate to the taxation of property have no application, no pertinency to the question here presented, and you can work out no logical rule from them by which to decide it. It is said that the Legislature must find classes —not make them. But you can not find exemptions. They must be declared, and, as we have seen, arbitrarily declared in the same manner as the jurisdiction of courts, and the right of appeal and similar rights and privileges are determined by the exercise of legislative judgment.

They say, you can not classify by amounts. Well, the power to classify by amount, to discriminate arbitrarily by amount fixed by the Legislature, and declared without any control has always existed and always must be exercised in legislation so long as we remain a free people. Classification by amount! Why, if your Honors please, the Congress of the United States has classified the right of suitors to go into the United States Courts by amount. Suppose my learned friend has a note for $1,500; that I have a note for $2,500; that citizenship is as required by law; that the questions arising on the

notes are identical; the rights which he desires to have protected by the decision of this Tribunal or by a circuit court of the United States are precisely identical with the rights I want to have adjudicated. Still Congress has distinguished between us upon the arbitrary amount of $2,000, and while I can get in, he is kept out. Can your Honors control that arbitrary discretion? Can you tell why the amount was not $5,000, why it was not $10,000 why it was not $1,000? Why was it increased from the original $500?

Courts can not tell because Courts do not know. Courts were not organized for that purpose. Courts have no such power.

The right of appeal is a privilege, though it might well be said to be a right. Yet in many of the States of the Union the right to have the adverse judgment of the trial reviewed is denied in one case and permitted in the other, upon a discrimination or distinction that depends wholly on amount, an arbitrary amount, not arrived at by any rule that can be stated or arrived at by reasoning. The uncontrolled and uncontrollable discretion of the Legislature fixes it, and the Courts are bound by the distinction, as declared.

So I might go through innumerable illustrations. Take the difference between grand and petit larceny. A man steals my pocketbook, but does not know what it contains when he steals it. In our State, if it turns out to contain $15, he goes to the county jail—is well fed—and in a brief period comes back into the community with no stain of felony upon him. If the pocketbook contains $15.10 he goes to the penitentiary; he is a felon branded and disgraced forever. What is the distinction? Amount. It is broader than that in some cases. It is $15 in Illinois. Why is it $15? Can you say of two

thieves, the moral qualities of whose acts are precisely the same, the one punished by temporary confinement in the local jail, the other committed to the penitentiary and branded as a felon, that there is a denial of equal protection of the laws? The discrimination is wholly and entirely and only upon the question of amount.

In California the difference in punishment was greater. A man was judicially hanged in California for stealing property worth $400, because the Legislature had determined that for grand larceny the jury might inflict capital punishment. The distinction as to amount was the distinction that sent that man to the gallows, whereas a man who committed as great a sin against society, as great an infraction of the commandments of Almighty God, would only be subjected to suffer temporary imprisonment or fine.

Not discriminate as to amount! Why, it is the most usual ground of discrimination. Arbitrary? My learned friend couples the words arbitrary and unreasonable. Whenever a Legislature comes to exempt, it must exempt arbitrarily; must it not? How else can it exempt? Massachusetts exempts $10,000. How does the Legislature arrive at $10,000 as the right amount to be exempt? Can the Massachusetts Court tell? Can your Honors tell? Can learned counsel suggest a rule or a distinction which will lead any Legislature to go right on this subject, and to do that which my friend says is reasonable? No. Because it is the uncontrollable discretion of the Legislature. And, as this Court has said in repeated cases, it is not to be presumed that the Legislature will do wrong on the subject.

Mr. Justice Harlan: Would your argument lead you to maintain the power of the Legislature to adopt this principle in ordinary taxation laws?

Mr. Moran: No, sir. I distinguish. But that is the difficulty with my learned friends on the other side. They do not distinguish. In states where exemption from tax on property is allowed, how are you going to fix what is a reasonable amount? I admit that there may be such an outrageous exemption on the part of the Legislature as points to an intention not to exempt fairly, but to reach some other ulterior purpose. That of course would be condemned. But how is this Court going to say that $20,000 exemption of the privilege of inheritance in Illinois is unreasonable, that $10,000 in Massachusetts is reasonable, or to say that the Massachusetts exemption is reasonable and the $7,500 exemption in Montana is unreasonable, or the $1,000 in Maryland, or $500 in California, or that $10,000 in New York is reasonable, or unreasonable? Will my learned and distinguished friend point out to this Court a rule that will determine the reasonableness of these exemptions, and put some of them on the one side of it, and some on the other? These exemptions are reached by the exercise of discretion in the Legislature under an official responsibility. They are not made for ulterior purposes. There is no ulterior design. The Legislature is acting under the warrant of its authority for the benefit of the community that it represents. It exercises its judgment. If it makes a mistake the next Legislature will correct it. There, as Chief Justice Marshall said, is the correction for that sort of legislation, and not in the Federal Tribunal.

Mr. Justice Harlan: I intended to ask you as to the power of the State to apportion one rate of taxation upon one kind of property and a higher rate upon other property.

Mr. Moran: If your Honor please, this bonus is not apportioned upon property at all. That is the distinction. It is the privilege or right to receive a specific legacy that is taxed.

Mr. Justice Harlan: I am not talking about legacies. I want to get at your opinion on this question, as to the power of the State to place an ordinary tax upon property, say up to $10,000 and its power, if it is worth more than $10,000 and under $20,000, to tax it at a higher rate.

Mr. Moran: We have no such rule in our State. No property can be exempted from taxation with us unless used for religious or charitable purposes. I have not examined cases with reference to that question, with a view to discussing it.

Mr. Justice Harlan: I wanted to see the extent to which your argument would lead you.

Mr. Moran: My argument does not apply to the right to exempt *property* from taxation. It may to a certain extent but I am not making the argument for that purpose. This Court can not decide this case on any such ground as that. My argument applies to the question of exemption of privileges.

Here is an exemption of $20,000 to lineals. They could exempt it all. Why is $20,000 too much? Chief Justice Taney said that in the case where the lineals were exempted together, and the tax was put upon the collaterals, it was all right, and that there was no

reason for interfering with the law, because there was an exemption of the lineals; that it did not make against the law at all. So, when you come to the collaterals, how are you going to say that $2,000 exemption to collaterals is unreasonable? On what do you proceed? Where is the plank on which you walk that leads to that conclusion? And what is the premise from which you start that authorizes you to go there? It does not exist. It is to be found neither in positive expression of authorities, nor in the reasonable conclusion to be drawn from admitted principles.

My learned friend admitted that there was a power of exemption. If you admit that there is a power of exemption, you give up the argument that you can not graduate a tax. Do you not graduate the moment that you exempt one sum and impose some tax on another? Is not that graduation? Take the case I have supposed in the brief —exemption of $1,000, imposition of tax of three per cent. on a legacy above $1,000 and less than $2,000, imposition of a tax of six per cent. upon a legacy of $2,000 and not exceeding $3,000. Is there a greater difference between no tax and three per cent. than there is between three per cent. and six per cent.? Is not the charge of six per cent. on one amount and three per cent. on another the exercise of identically the same power as charging nothing on one amount and three per cent. on another? Why may you not say to a man who receives a legacy of $50,000, "You shall pay upon this legacy $3,000?" Is it assessed upon the property? No. It is assessed upon the privilege.

Let us again consider the power as exercised by a Special Act. Suppose that there is no law in a State authorizing testamentary disposition; a man applies to the Legislature and asks a Special Act

authorizing him to receive a bequest of $50,000, and the Legislature passes a law authorizing him to receive from a specified person a legacy of $50,000. May not the Legislature say: Having granted you this privilege, you shall pay into the State treasury the sum of $3,000? You must answer yes. Then a man comes who wants the privilege of receiving a legacy of $10,000. May not the Legislature say to him: You may have this right, this privilege, upon your paying into the treasury of the State $300? May it not fix the bonus at $50? By what rule do you say that either of those two men is denied the equal protection of the laws?

If this can be done by Special Act, where there is no limitation on the Legislature to pass a Special Act, can not that body pass a law classifying these two persons with reference to their privileges, and say such persons as enjoy under this law the privilege of receiving bequests or devises of the value of $50,000 shall pay for that privilege $3,000, and those who shall receive only $10,000 shall pay for that privilege some specific sum. Why is there to be any ratability between the two? Why is there to be any uniformity or equality between the two—I mean as a matter of the exercise of the Constitutional power?

When you come to say that wise legislation will apportion such charges this way or that way, you are entering upon the realm of statesmanship into which the learned counsel has in his brief invited this Court to travel.

When you come to say that the Legislature can not put a progressive tax or a progressive set of bonuses upon privileges granted, classifying, and putting the same rate upon the same class, the distinc-

tion as to class being founded on amount, you are denying that in granting these privileges the Legislature may estimate the ability of the party to pay by the value of the gift which the Legislature holds out to him. There will be no warrant found in the law, or in the decisions for the exercise of any such discretion or control in this Court as that.

As I said before, this law passed by the Legislature of Illinois was declared constitutional by the Supreme Court of Illinois. That declaration, so far as the Constitution of Illinois is concerned, is binding upon this Court. The only inquiry here is, does this law violate the provisions of the Fourteenth Amendment? You have said that the Fourteenth Amendment protects from unequal taxation, but you have also said that the Fourteenth Amendment does not control the State in imposing conditions or impositions or bonuses upon privileges granted.

Bonus is the correct word to use as has been aptly determined by this Court, with reference to these privileges. In 3 Howard, in the case of Gordon's Appeal v. The Tax Court, Mr. Justice Wayne, speaking about the charge made for a franchise, says:

"A round sum or an annual charge, with or without reference to the capital stock, may be asked by a Legislature for such a franchise. It may be more convenient for the banks to have such a consideration or bonus distributed through the years of their corporate existence than to pay its equivalent in advance."

And in 16 Wallace, Mr. Justice Hunt adopts the definition of bonus given by Webster in an opinion of the case of Kennicott v.

The Supervisors. In a portion of the opinion on page 475, the Court says, speaking of the definition of this word:

"It is thus defined by Webster: 'A premium given for a loan or charter, or other privilege granted to a company as, The bank paid a bonus for its charter.'"

In 21 Wallace, Mr. Justice Bradley, in the case of The Railroad vs. Maryland, in speaking about the discretion that the State might exercise to impose upon a railroad a charge for the privilege granted, said:

"It has a discretion as to the amount of that compensation. That discretion is legislative, a sovereign discretion, and in its very nature is unrestricted and uncontrolled. The security of the public against any abuse of this discretion resides in the responsibility to the public of those who, for the time being, are officially invested with it. In this respect it is like all other legislative power when not controlled by constitutional provision; and the Courts can not presume that it will be exercised detrimentally."

Then these charges are bequests and devises are bonuses, and an inheritance tax is imposed upon different inheritances coming within classes distinguished from each other by fixed amounts, and the Legislature is not bound to put a ratable imposition upon one class as compared with another. The Legislature is free to select the objects of its bounty. It may allow one class of inheritances, one class of bequests, one class of devises, to pass to the persons who take them without the imposition of any tax at all. It is the free grace of the Legislature. It may classify others, so that for $20,000

legacies or legacies in excess thereof, a certain rate shall be paid. It may classify by distinction in kin, and it may re-classify these classes, by distinction as to amount.

My learned friends say the Legislature can not classify by distinction as to amount as between strangers. Why not? Strangers have no rights, not even the flimsy, so-called natural rights that counsel have been so vigorously claiming for kindred. Why can not the Legislature say: We will permit legacies to strangers, and we will classify the legacies according to amounts; we will tax one amount at one rate, and another amount at another rate? Your answer must be: Yes, unless the power to tax property is confused with the power of the Legislature to prescribe its own conditions for the privileges that it grants by way of franchise or by way of inheritance, or by way of testamentary capacity.

In the cases cited in our brief, there will be found apt illustration. Mr. Schouler, in his work on Wills, says there are two wills: There is the Will of the State, expressed in its Statute of Descents; and there is the Will of the testator, which he is permitted by law to make. The will of the State may limit the testator's testamentary power. As one of your Honors suggested, he might be denied permission to will away from his children more than one half of his property, so the State might direct that he should not be permitted to will anything at all. The will of the State is supreme. The State writes out its will. It is known to all men. The testator may adopt the State's will, and let his property go under it if he sees fit. Where the testamentary right is given, the testator may exercise that right within his discretion, but all because he is authorized by the State to do so, it is a privilege which the State permits him to exercise.

Your Honors have heard a somewhat elaborate argument on progressive taxation. That argument might well be addressed, might properly be addressed to a Legislative body. It has no place in an argument to a Court. We have gone into that territory only because we felt obliged to follow, in the course of this argument, the lead that was set for us by the learned counsel on the other side. They wish to hold up before this Court the spectre of communism, and they say that the tendency of this legislation is to diffuse wealth. Well, if your Honors please, since the first organization of our government, the American policy has been the diffusion of wealth. In that regard our policy is distinguished from England and from the continental countries of Europe. We abolished promogeniture for the very purpose of compelling a diffusion of wealth, the distribution of wealth, and not permitting it to accumulate in families as it did in Great Britain. I admit that the necessary tendency, influence and operation of such legislation as this is to diffuse property, not to allow it to accumulate in great aggregations in families, and thus make its power dangerous to the State and to the Republic. One of the great dangers of our day is the accumulation, the aggregation of immense personal wealth in the hands of individuals so that they are able to corrupt Legislatures and Congresses, and to defy Courts. Every thoughtful and patriotic student of American politics has felt alarm at the tendency in this day to aggregate immense wealth in the hands of families and individuals. It is a recognized danger to the State just as promogeniture and the holding of entailed estates was recognized by the early fathers of the Republic to be incompatible with free institutions.

This law tends to diffuse estates, and to distribute them into the hands of many, instead of leaving this corrupting power of aggregate wealth in the hands of a few.

When counsel draw their inspiration from economists of the old world they should remember that the policy of this nation is not the policy of England.

They cite to this Court in argument the views of Mr. Lecky, who is indeed honorably known as a historian and literary man, but totally unknown as an economist, and who, because Mr. Gladstone and his liberal parliament imposed new death duties in England, wrote the work from which learned counsel quotes very much as an apologist for toryism in Great Britain; such an authority an American lawyer cites to the Supreme Court of the United States as suggesting the policy that the Court should approve on the question of taxing inheritances. When such a writer is cited as one whose ideas as to the concentration of property are to be imposed on us, I take the liberty of quoting to this Court the views of an eminent citizen whose opinion is not less entitled to respect because he is a member of this bench —who recognizes the policy and tendency of this legislation. Mr. Justice Brewer says:

"I have often urged the thought, as one of the most just of taxes, and if it were granted in proportion to the amount of property passing, I think it would be most beneficial. It would tend largely to prevent the accumulation of property in family line, and work that distribution which is for the interest of all."

Mr. Justice Fuller: That was not a judicial decision.

Mr. Moran: Not a judicial utterance, your Honor. I do not cite that as binding upon the learned judge as a judicial expression. But is it not as much entitled to the respect of this Court as the opinion of Mr. Lecky upon that question? I only cite this because it accords with the conviction that will enter the mind of any intelligent citizen. The expression recognizes that the tendency of such legislation is American in tone and character; that it sustains the policy we adopted when we abolished promogeniture and required that property should pass equally to lineals, and equally to collaterals.

Another reason, your Honors: It is the universal experience in this country that these great aggregations of personal wealth escape their due proportion of taxation. Men who are able to build up these vast fortunes, this vast personal wealth, seem to be endowed with the cunning which enables them to escape the assessor and avoid the imposition of the just burden upon property in their hands.

We show in our brief that it is stated by a gentleman of, I assume, reputation in Massachusetts, that in that State personal property escapes taxation to such an extent that the State loses from $14,000,000 to $15,000,000 a year. Now, it is no doubt true that the man who evades his taxes in his lifetime will more than willingly submit to pay his taxes when he is dead. Most of us will be more willing to pay our taxes when we are dead. We are here for a period, and we enjoy this property while we have it. But, when we are dead, we are dead for a very long time, and we have but little use for property.

It has been said that there is nothing certain but death and tax If your Honors please, death is certain, but the experience of every state and every municipality in this Union demonstrates this one

thing, as a most important fact, in our present governmental life, that taxation is not certain. This law finally makes taxes as certain as death.

Of course these are considerations with which your Honors have nothing to do, but they have been imposed upon you by the industry and ingenuity and splendid capacity of learned and distinguished counsel who attack this law. But, with all their ability, with all their research, with all their industry, they have produced to this Court an argument that is mighty only in its fallacies, and beautiful only by the ingenuity with which its errors are concealed. Their propositions have no support in law, no support in logic. They ask this Court to hold inheritance tax laws void because the tax is progressive.

They ask this Court to say, by the decision of this case, that inheritance and testamentary capacity are natural rights, protected by law, vested, and that any attempt of the Legislature to divest them or to control them is subject to constitutional limitation and inhibition. They ask this Court to take the place of the Legislature of Illinois. They ask your Honors to find in the Fourteenth Amendment a principle which they say is potential in it, but which, when that amendment was adopted, was not in the mind or thought, or comprehension of the men who voted in favor of it, or of the states when they agreed to it. If the Fourteenth Amendment of the Constitution prohibits the people of the states from regulating, by such conditions as they see fit to impose, these franchises and privileges which they grant, it is time that it was repealed, and that there should be something adopted in place of it more in consonance with the idea of my learned friends, that ambiguous text of scripture—

for instance: "To him that hath shall be given, from him that hath not shall be taken away even that which he hath."

The poor man! Why, it is the poor *millionaire* whose voice your Honors hear in opposition to this law. It is the poor aggregator of immense wealth, building it up, controlling it, managing it, and avoiding the just burden upon it. It is the building up of "clawses," as Mr. Lecky would say, maintaining the classes and their privileges by not subjecting them, in the passing of their property to their posterity, to the imposition of a bonus which might make up to the State for all that by a life of industrious concealment and avoidance of taxes they have filched from the State by evading the just burdens that they should have discharged to the government which has afforded them both protection and opportunity.

If we have not now heard, if your Honors please, all the grounds upon which my learned friends undertake to assail this law, it is their fault, not ours. I have dealt with all the propositions contained in their brief. Those propositions, I think, your Honors will determine as soon as you read them to be untenable. I know the world-wide reputation of the honorable and distinguished gentleman (Mr. Harrison) who is to follow me in this case. But I know the wisdom, the acumen and the learning of this Court. I know its patience in search, its fearlessness in determination. It is here to announce the law, not to make it. It is here to declare what it is, and not to criticise its policy. It is here to say to Illinois: You are a sovereign State; you grant your privileges and impose upon them such conditions as you see fit; for unwise legislation or unjust discrimination you must answer to the citizens you represent. The power to correct

is in the hands of your own people, and is not to be exercised by the Federal Court.

I thank your Honors for the attention which you have given me in this rather long and somewhat desultory argument.